

MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. TAI CHAI GEOK

[F.C. (Gill Ag. L.P., Ong Hock Sim Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) August 19, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 47 of 1976]

Criminal Law and Procedure — Appeal — Verdict of not guilty by jury — Acquittal of accused — Whether acquittal can be quashed on appeal — Criminal Procedure Code (F.M.S. Cap. 6), s. 229 — Courts of Judicature Act, 1964, s. 50 — Federal Constitution, Article 7(2).

In this case on a charge under section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952, the jury returned a majority verdict of 5 to 2 of not guilty. The accused was acquitted. The Public Prosecutor appealed to the Federal Court and reliance was placed on the recent amendment to section 50 of the Courts of Judicature Act, 1964.

Held, dismissing the appeal: (1) by virtue of section 229 of the Criminal Procedure Code, the court or judge has no discretion but to accept the jury's verdict;

(2) the Federal Court has no power to quash an acquittal in such circumstances.

FEDERAL COURT.

Dato Haji Abdullah bin Ngah (Deputy Public Prosecutor) (*Zaleha binti Zahari* (Senior Federal Counsel) with him) for the appellant.

Karpal Singh for the respondent.

Ong Hock Sim Ag. C.J. (Malaya) (delivering the judgment of the Court): This appeal is from the judgment of the High Court at Alor Star acquitting the respondent, who had been charged under section 39B(1)(a) of the Dangerous Drugs Ordinance (No. 30 of 1952) and punishable under subsection (2) of the same section, following the majority verdict of 5 to 2 of "not guilty" of the jury.

This is, of course, unique and unprecedented in the history of criminal justice. It is urged by Senior Federal Counsel that this can now be done as a result of the recent amendment to section 50 of the Courts of Judicature Act 1964 (Rev. Act 91 of 1972). It reads:—

"50. (1) The Federal Court shall have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of —

(a) its original criminal jurisdiction; or

(b)

subject to this or any other written law regulating the terms and conditions upon which criminal appeals may be brought.

x x x

(2A) An appeal by the Public Prosecutor shall be either against acquittal or sentence provided notice of such appeal is given by, or with the consent in writing of, that officer only."

He referred us to section 2 of the Criminal Appeal Act, 1968 (U.K.) which we now set out:—

"Section 2(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think —

(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case, it is unsafe or unsatisfactory;

(b) that the judgment of the court should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial,

and in any other case shall dismiss the appeal."

A

We are asked to apply the converse of section (2) and hold we may reverse an acquittal by a Jury, if we are of opinion that on the evidence adduced, the verdict was unsupportable or unreasonable. He quoted from Sir Patrick Devlin's "Trial by Jury" at pages 87-88:—

"As Lord Chief Justice Mansfield put it in 1784: 'It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, ... which is a matter entirely between God and their own consciences'. Mr. Justice Willes said: 'I admit the jury have the power of finding a verdict against the law and so they have of finding a verdict against evidence, but I deny they have the right to do so.'"

B

He would have us in such a case to over-rule the verdict of the jury and (1) substitute the verdict of this court for that of the jury or (2) order a retrial if we are satisfied that there are good and sound reasons for doing so.

C

We do not think it proper or within our competency to do either. Appellate jurisdiction is governed by statute and I quote from Sir Patrick Devlin (*ibid*):—

D

"In 1907 the position was put on a statutory basis. The Act creating the Court of Criminal Appeal gives the court power to 'allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.' Since under the Act only the prisoner has the right of appeal, the result is that a verdict of Guilty can be overridden while a verdict of Not Guilty remains unchallengeable. The power to order a new trial is not included among the powers of the Court of Criminal Appeal."

E

It must not be overlooked what Chief Justice Pratt said:—

"It was never yet known that a verdict was set aside by which the defendant was acquitted in any case whatsoever upon a criminal prosecution. While... the judge might put the matter very strongly in his summing-up, he cannot direct a verdict of Guilty or refuse to accept a verdict of Not Guilty if returned. In short, there cannot be in law a perverse verdict of acquittal.... Lord Chancellor Sankey said that for the judge to say that the jury must in law find the prisoner Guilty would be to make him 'decide the case and not the jury'...."

F

The amendment to section 50 Courts of Judicature Act was effected by deletion of the words "by a person convicted by the High Court" and substitution therefor "against any decision made by the High Court" but was expressly "subject to this or any other written law regulating the terms and conditions upon which criminal appeals may be brought." We were perforced to take cognizance of "any other written law... regulating... criminal appeals." Section 229 of the Criminal Procedure Code enacts:—

G

"229. If the verdict is not guilty either unanimously or by a majority the judge shall record judgment of acquittal."

H

As thus enacted, the court or judge has no discretion but to accept the jury's verdict. I quote again from Sir Patrick Devlin:—

"The fundamental distinction between the power of the civil jury and the power of the criminal jury is that a verdict of a civil jury cannot survive if it is contrary to law and a verdict of acquittal can. This great power of acquittal rests upon three pillars. First, there must be a verdict; the defence can never be withdrawn from the jury; the word of condemnation must come from the lips of their foreman. Secondly, there is no power to demand a special verdict. The jury cannot therefore be made to explain their verdict; they cannot be questioned upon it. They are to be told what the law is, but in any case which involves both fact and law no one is to know whether they have followed the law or not, for

I

under a general verdict no one can know how they have distinguished between fact and law. As Lord Mansfield said in the passage I have quoted: 'The distinction is preserved by the honesty of the jury. The constitution trusts, that under the direction of a judge they will not usurp a jurisdiction which is not in their province.' The third is that even in a case in which a verdict of acquittal is such that it can only be contrary to law, nevertheless it is the last word. That is secured by the fact that the common law gives no power to the judge to set it aside; and that the statutory power of setting aside a verdict vested in an appellate court, which is the way whereby the unlawful verdicts of civil juries can be controlled, cannot in a criminal case be invoked at the suit of the prosecution."

It is not out of place now to refer to Article 7(2) of the Constitution which says:—

"A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered."

As the law stands, we are of the view that no power to quash an acquittal is permitted and we therefore dismiss the appeal and confirm the order of acquittal by the learned judge. In the light of our decision, it must necessarily follow that the Warrant of Arrest issued pursuant to section 56A must be vacated and we so order.

Appeal dismissed.

Solicitors: Karpal Singh & Co.

LAW TIM WAH v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.J.J.) September 6, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 34 of 1977]

Criminal law and Procedure — Appeal — Finding of fact by trial court — Prejudicial evidence admitted as result of cross-examination — Cautioned statement not tendered by prosecution — Discretion of prosecution.

The appellant had been convicted on charges of unlawful possession of a revolver. The learned trial judge was satisfied beyond reasonable doubt that the appellant was seen and chased by the police in the vicinity and that the appellant was armed with a revolver and fired at the police officer and was subsequently arrested. The prosecution did not use the cautioned statement of the appellant.

Held, dismissing the appeal: (1) the appeal court could not interfere with the finding of the fact of the trial judge who saw and heard the witnesses and was in a better position to assess their credibility;

(2) it was alleged that the learned judge had taken into consideration inadmissible and highly prejudicial evidence resulting in a miscarriage of justice but the appellant had no reason to complain of prejudicial evidence when these arose as a result of cross-examination. No substantial miscarriage of justice had occurred;

(3) it was strictly a matter for the prosecution to decide whether to use the cautioned statement or not. If the prosecution considered that the other evidence was sufficiently strong to establish guilt, they were entitled to use their discretion not to introduce the cautioned statement.

Case referred to:—

(1) *Girdari Lall & Ors. v. Public Prosecutor* [1946] M.L.J. 87.

FEDERAL COURT.

K. Kumaraendran for the appellant.

A *Datuk Haji Abdullah bin Ngah* (Deputy Public Prosecutor) for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We dismissed the appeal and stated we would give our reasons later. We do so now.

B On June 22, 1976, acting on information, A.S.P. John Choo Hon (PW2) organised a police party in raiding a place in the vicinity of Sandilands Street Ghaut. When they reached the vicinity they split up into small groups in search of appellant who was a wanted person. D.P.C. Woon Hoi Din (PW3) saw appellant and ordered him to stop. Instead, appellant ran away. As he fled he turned round and fired a shot at PW3 who fired two shots in return. As the chase went on there were further exchanges of shootings. The shots were heard by other police officers. D.P.C. Harun bin Ramin (PW4) who was with Inspector Mahyuddin (PW5) then saw appellant emerging from one of the houses carrying a revolver in his right hand. **D** They gave chase. Appellant ran into a corner and fired a shot hitting PW4's right leg. Appellant ran away and they lost sight of him. Later, they saw that appellant was arrested. The next person to see appellant was Inspector Abdul Rani bin Abdullah (PW6). He shouted at appellant to stop but appellant again fled. Meanwhile, P.C. Soo Ho Wei Kong (PW7) who was off duty and happened to be in the vicinity, saw appellant running out of a lane along Bridge Street. Appellant had a revolver in his right hand. PW7 followed appellant. Then appellant tucked the revolver in his waist. When he was close by, appellant took out his revolver as he was trying to stop a motorist. At that moment PW7 grappled the revolver and the wrist of appellant. There was a scuffle and two shots were fired. PW7 was shot in the arm but managed to disarm appellant and took possession of the revolver. PW6 saw what happened. He came to PW7's assistance and arrested appellant. **E**

Appellant admitted he was in the vicinity but denied he was carrying a revolver and firing at the police officers. He claimed that there was another person. It was that person who actually carried the revolver, fired the shots, threw it down and fled when appellant was apprehended. However, the police officers taking part in the raid claimed to be chasing the appellant who was carrying a revolver. There was never another person. **G**

H There were two conflicting stories. The learned judge had to decide which story was true. He saw and heard all the witnesses and was in a better position to assess their credibilities. He stated clearly that he had no reason to doubt the veracity of the prosecution witnesses and that he had no hesitation in rejecting the presence of another person involved in the chase. **I** In other words, he regarded the story of the presence of another person as a figment of appellant's imagination. The facts were clear. The learned judge was satisfied beyond reasonable doubt that appellant was seen and chased by the police in the vicinity and that appellant was armed with a revolver and fired at the police officer and was subsequently arrested. In short, he was sure of appellant's guilt.